



6714-01-P

FEDERAL DEPOSIT INSURANCE CORPORATION

12 CFR Part 380

RIN 3064-AE05

Restrictions on Sales of Assets of a Covered Financial Company by the Federal Deposit Insurance Corporation

AGENCY: Federal Deposit Insurance Corporation.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Federal Deposit Insurance Corporation (“FDIC”) is proposing a rule to implement a section of the Dodd-Frank Wall Street Reform and Consumer Protection Act (“Dodd-Frank Act”). Under the section, individuals or entities that have, or may have, contributed to the failure of a “covered financial company” cannot buy a covered financial company’s assets from the FDIC. This proposed rule establishes a self-certification process that is a prerequisite to the purchase of assets of a covered financial company from the FDIC.

DATES: Written comments must be received by the FDIC not later than **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments by any of the following methods:

- Agency Web Site: <http://www.fdic.gov/regulations/laws/federal/propose.html>. Follow instructions for submitting comments on the Agency Web Site.

- E-mail: Comments@FDIC.gov. Include “RIN 3064-AE05” in the subject line of the message.
- Mail: Robert E. Feldman, Executive Secretary, Attention: Comments, Federal Deposit Insurance Corporation, 550 17th Street, NW, Washington, DC 20429.
- Hand Delivery/Courier: Guard station at the rear of the 550 17th Street Building (located on F Street) on business days between 7 a.m. and 5 p.m. (EDT).
- Federal eRulemaking Portal: <http://www.regulations.gov/>. Follow the instructions for submitting comments.
- Public Inspection: All comments received will be posted without change to <http://www.fdic.gov/regulations/laws/federal/propose.html> including any personal information provided. Paper copies of public comments may be ordered from the Public Information Center by telephone at 703-562-2200 or 1-877-275-3342.

FOR FURTHER INFORMATION CONTACT: Marc Steckel, Deputy Director, Division of Resolutions and Receiverships, 202-898-3618; Craig Rice, Senior Capital Markets Specialist, Division of Resolutions and Receiverships, 202-898-3501; Chuck Templeton, Senior Resolution Planning & Implementation Specialist, Office of Complex Financial Institutions, 202-898-6774; Elizabeth Falloon, Supervisory Counsel, Legal Division, 703-562-6148; Shane Kiernan, Counsel, Legal Division, 703-562-2632; Federal Deposit Insurance Corporation, 550 17th Street, NW., Washington, D.C. 20429.

SUPPLEMENTARY INFORMATION:

I. Background

Section 210(r) of the Dodd-Frank Wall Street Reform and Consumer Protection Act , 12 U.S.C. 5390(r) (“Section 210(r)”), prohibits certain sales of assets held by the FDIC in the course of liquidating a covered financial company, including sales of equity stakes in subsidiaries. The Dodd-Frank Act requires the FDIC to promulgate regulations which, at a minimum, prohibit the sale of an asset of a covered financial company by the FDIC to: (1) any person who has defaulted, or was a member of a partnership or an officer or director of a corporation that has defaulted, on one or more obligations exceeding \$1,000,000 to such covered financial company, has been found to have engaged in fraudulent activity in connection with such obligation, and proposes to purchase any such asset in whole or in part through the use of financing from the FDIC; (2) any person who participated, as an officer or director of such covered financial company or of any affiliate of such company, in a material way in any transaction that resulted in a substantial loss to such covered financial company; or (3) any person who has demonstrated a pattern or practice of defalcation regarding obligations to such covered financial company.

A similar restriction applicable to sales of assets of insured depository institutions in conservatorship or receivership is found in section 11(p) the Federal Deposit Insurance Act, 12 U.S.C. 1821(p) (“Section 11(p)”). The FDIC promulgated a rule implementing this statutory

proscription on July 1, 2000. That rule, entitled “Restrictions on the Sale of Assets by the Federal Deposit Insurance Corporation,” can be found at 12 CFR part 340¹ (“Part 340”).

Because Section 210(r) and Section 11(p) share substantially similar statutory language, Part 340 serves as a model for the proposed rule. Although Part 340 and the proposed rule are similar in many ways, the proposed rule is distinct because it applies to sales of covered financial company assets by the FDIC and does not apply to sales of failed insured depository institution assets. A covered financial company resolution will be different from an insured depository institution resolution because the nature of the assets and the manner in which sales are conducted will be different. Furthermore, although the FDIC has been appointed as receiver of hundreds of insured depository institutions, appointment of the FDIC as receiver for a covered financial company is expected to be rare. The proposed rule would not apply to sales of assets of a failed insured depository institution by the FDIC and prospective purchasers seeking to buy assets of an insured depository institution from the FDIC should refer to Part 340 only.

The proposed rule addresses the statutory prohibitions contained in Section 210(r). It does not address other restrictions on sales of assets. For instance, the proposed rule does not address sales of assets by the FDIC to its own employees or to contractors it engages. Further, the proposed rule is separate and apart from any policy that the FDIC has, or may adopt or amend, regarding collection of amounts owed by obligors of a failed insured depository institution or a covered financial company. The focus of a collection policy is to encourage delinquent obligors to promptly repay or settle obligations, which is outside the scope of Section 210(r) and the proposed rule.

¹ See 65 FR 14816 (July 1, 2000).

Section-by-Section Analysis

Paragraph (a)(1) of the proposed rule states its purpose, which is to prohibit individuals or entities who profited or engaged in wrongdoing at the expense of a covered financial company, or seriously mismanaged a covered financial company, from buying assets of any covered financial company from the FDIC.

Paragraph (a)(2) describes the proposed rule's applicability. Paragraph (a)(2)(i) states that the proposed rule applies to sales of assets of a covered financial company by the FDIC. The assets of a covered financial company vary in character and composition, and range from personal property to ownership of subsidiary companies and entire operating divisions.

The proposed rule would apply to sales by the FDIC both as receiver and in its corporate capacity. The FDIC may, in its corporate capacity, purchase a covered financial company's assets from the receiver and then market those assets to the public. The proposed rule makes clear that the prohibitions on sales to certain individuals and entities apply to sales by the FDIC in any capacity.

Paragraph (a)(2)(ii) delineates the applicability of the proposed rule to sales by a bridge financial company. Sales of bridge financial company assets are not expressly subject to the statutory prohibition under Section 210(r) because once such assets are transferred to the bridge financial company, they are no longer "assets of a covered financial company" that are being sold "by the

[FDIC].” The statute permits the FDIC to promulgate a more restrictive regulation than is required under Section 210(r), which sets forth a “minimum” requirement. The proposed rule would cover sales by a bridge financial company if the FDIC’s approval of the sale is required under the bridge financial company’s corporate governance structure. Sales conducted in the ordinary course of business by staff of the bridge financial company would not, on the other hand, require approval.

In general, the FDIC anticipates that a bridge financial company’s charter, articles of incorporation or bylaws will require that the bridge financial company obtain approval from the FDIC as receiver before conducting certain significant transactions, such as a sale of a material subsidiary or line of business. Because a bridge financial company would be established by the FDIC to more efficiently resolve a covered financial company, the FDIC believes that the imposition of the restrictions set forth in the proposed rule on certain sales by a bridge financial company furthers the objective of Section 210(r) by prohibiting the same persons restricted from buying covered financial company assets (officers and directors who engaged in fraudulent activity or caused substantial losses to a covered financial company, for example) from buying those assets after those assets have been transferred to a bridge financial company.

Paragraph (a)(2)(iii) clarifies the proposed rule’s applicability to sales of securities backed by a pool of assets (which pool may include assets of a covered financial company) by a trust or other entity. It provides that the restriction applies only to the sale of assets by the FDIC to an underwriter in an initial offering, and not to any other purchaser of the securities because subsequent sales to other purchasers would not be conducted by the FDIC.

Paragraph (a)(2)(iv) clarifies the applicability of Section 210(r) and the proposed rule to certain types of transactions involving marketable securities and other financial instruments. Paragraph (a)(3)(i) expressly states that the prohibition does not apply to the sale of a security, commodity, “qualified financial contract” (as defined in 12 U.S.C. 1821(e)(10)), or other financial instrument where the customary manner for sale and settlement does not permit the seller to exercise any control in selecting the purchaser and the sale actually is conducted in this customary manner. For example, if the FDIC as receiver for a covered financial company were to sell publicly-traded stocks or bonds that the covered financial company held for investment, it might well order the covered financial company’s broker or custodian to conduct the sale. The broker or custodian would then tender the securities to the market and accept prevailing market terms offered by another broker, a specialist, a central counterparty or a similar financial intermediary who would then sell the security to another purchaser. In this scenario it is not possible for the FDIC as receiver to control selection of the end purchaser at the time of sale, thus such a transaction is not a “sale...by the [FDIC]” to a prospective purchaser within the meaning of the statute because the FDIC has no way to select the prospective purchaser. Moreover, a prospective purchaser of such assets will not be able to select the FDIC as the seller and therefore could not determine whether Section 210(r) and the proposed rule apply to the transaction.

Under paragraph (a)(2)(v), judicial or trustee’s sales of property that secures an obligation to the FDIC as receiver for a covered financial company would not be covered. Although the FDIC as receiver has a security interest in the property serving as collateral and has authority to initiate the foreclosure action, the selection of the purchaser and terms of the sale are not within the

FDIC's control. Rather, the court or trustee conducts the sale in accordance with applicable State law and selects the purchaser. In this situation, the sale is not a sale by the FDIC. This exception does not affect sales of collateral by the FDIC where the FDIC is in possession of the property and conducts the sale itself. Where the FDIC has control over the manner and terms of the sale, it will require the purchaser's certification that the purchaser is not prohibited from purchasing the asset.

Section 210(r) creates an exception from the prohibition on asset sales for sales made pursuant to a settlement agreement with the prospective purchaser. It states that the prohibition does not apply if the sale or transfer of the asset resolves or settles, or is part of the resolution or settlement of, one or more claims that have been, or could have been, asserted by the FDIC against the person regardless of the amount of such claims or obligations. The proposed rule provides in paragraph (a)(2)(vi) that such sales are outside the scope of the proposed rule.

Paragraph (a)(3) makes expressly clear that the FDIC retains the authority to establish other policies restricting asset sales and expressly contemplates, among other things, the adoption of a policy prohibiting the sale of assets to other prospective purchasers, such as certain employees or contractors that the FDIC engages, or individuals or entities who are in default on obligations to the FDIC. The restrictions of the proposed rule are, however, limited to sales of assets of a covered financial company.

Paragraph (b) sets forth definitions used in the proposed rule. Several of these definitions have been adopted from Part 340, such as the definitions of "person," "associated person" and

“default.” The term “financial intermediary,” which is not found in Part 340, has been defined for use in the proposed rule as well.

Paragraph (c) of the proposed rule sets forth the operative rule for restricting asset sales. An individual or entity is ineligible to purchase assets from a covered financial company if it or its “associated person” has committed an act that meets one or more of the conditions under which the sale would be prohibited. In applying the rule, the first step is to determine whether the “person” who is the prospective purchaser is an individual or an entity. The next step is to determine who qualifies as an “associated person” (as defined in paragraph (b)(1) of the proposed rule) of that prospective purchaser. If the prospective purchaser is an individual, then the prospective purchaser is ineligible to purchase any asset of a covered financial company from the FDIC if that individual or (i) that individual’s spouse dependent child or member of his or her household, or (ii) any partnership or limited liability company of which the individual is or was a member, manager or general or limited partner, or (iii) any corporation of which the individual is or was an officer or director has committed an act that would render the individual ineligible to purchase. If the prospective purchaser is a partnership or other entity, then it is ineligible to purchase if either the purchasing entity or (i) its managing or general partner or managing member, or (ii) an individual or entity that owns or controls 25% or more of the entity has committed an act that would render the entity ineligible to purchase.

The proposed rule describes the conditions under which a sale would be prohibited in paragraph (c)(1). A person is ineligible to purchase any asset of a covered financial company from the FDIC if it or its associated person, prior to the appointment of the FDIC as receiver for the

covered financial company: (A) has participated as an officer or director of a covered financial company or an affiliate thereof in a “material way in a transaction that caused a substantial loss to a covered financial company” (as defined in paragraph (c)(2) discussed below); (B) has been removed from, or prohibited from participating in the affairs of, an insured depository institution, an insurance company or a financial company pursuant to any final enforcement action by its primary financial regulatory agency; (C) has demonstrated a pattern or practice of defalcation regarding obligations to any financial company; (D) has been convicted of committing or conspiring to commit any offense under 18 U.S.C. 215, 656, 657, 1005, 1006, 1007, 1008, 1014, 1032, 1341, 1343 or 1344 (having generally to do with financial crimes, fraud and embezzlement) affecting any covered financial company and is in default with respect to one or more obligations owed by that person or its associated person; or (E) would be prohibited from purchasing assets from a failed insured depository institution under 12 U.S.C. 1821(p) and its implementing regulation at 12 CFR part 340.

The proposed rule establishes parameters to determine whether an individual or entity has participated in a “material way in a transaction that caused a substantial loss to a covered financial company” as this concept is used but not defined in the statute. Under paragraph (c)(2), a person has participated in a material way in a transaction that caused a substantial loss to a covered financial company if, in connection with a substantial loss to a covered financial company, that person has been found in a final determination by a court or administrative tribunal, or is alleged in a judicial or administrative action brought by the FDIC or by any component of the government of the United States or of any State to have: (1) violated any law, regulation, or order issued by a Federal or State regulatory agency, or breached or defaulted on a

written agreement with a Federal or State regulatory agency or breached a written agreement with a covered financial company; or (2) breached a fiduciary duty owed to a covered financial company. A “substantial loss,” defined in paragraph (b)(9), means: (1) an obligation that is delinquent for ninety (90) or more days and on which a balance of more than \$50,000 remains outstanding; (2) a final judgment in excess of \$50,000 remains unpaid, regardless of whether it becomes forgiven in whole or in part in a bankruptcy proceeding; (3) a deficiency balance following a foreclosure or other sale of collateral in excess of \$50,000 exists, regardless of whether it becomes forgiven in whole or in part in a bankruptcy proceeding; or (4) any loss in excess of \$50,000 evidenced by an IRS Form 1099–C (Information Reporting for Cancellation of Debt). There is no reprieve for a prospective purchaser who has participated in a material way in a transaction that caused a substantial loss to a covered financial company. Such prospective purchaser is indefinitely prohibited from purchasing assets of any covered financial company from the FDIC notwithstanding the passage of any amount of time.

The approach to determine whether a person has participated in a material way in a transaction that has caused a substantial loss to a covered financial company is comparatively similar to the approach under Part 340. In the proposed rule, the dollar threshold for a substantial loss is set at \$50,000, just as it is in Part 340. The FDIC believes that the \$50,000 threshold is consistent with the Act because the statute sets the standards that the FDIC shall, at a minimum, establish by regulation and leaves the interpretation of subjective terms within the FDIC’s discretion.

Under paragraph (c)(3) of the proposed rule, a person or its associated person has demonstrated a “pattern or practice of defalcation” with respect to obligations to a covered financial company if

the person or associated person has engaged in more than one transaction that created an obligation on the part of such person or its associated person with intent to cause a loss to a covered financial company or with reckless disregard for whether such transactions would cause a loss and the transactions, in the aggregate, caused a substantial loss to one or more covered financial companies.

Although the statute restricts only the sale of assets of the covered financial company that held the defaulted obligation of the prospective purchaser, restrictions contained in the proposed rule apply regardless of which covered financial company's assets are being sold. The FDIC believes adopting this more stringent approach is consistent with the Act because the statute sets only the minimum standards that the FDIC must meet with its proposed rule.

Paragraph (d) of the proposed rule restricts asset sales when the FDIC provides seller financing, including financing authorized under section 210(h)(9) of the Dodd-Frank Act. It restricts a prospective purchaser from borrowing money or accepting credit from the FDIC in connection with the purchase of covered financial company assets if there has been a default with respect to one or more obligations totaling in excess of \$1,000,000 owed by that person or its associated person and the person or its associated person made any fraudulent misrepresentations in connection with such obligation(s).

In this proposed rule, the FDIC does not intend to imply that it will provide seller financing in connection with any asset sales nor that, if it elects to provide seller financing, it will do so to a person who does not meet other criteria that the FDIC may lawfully impose, such as

creditworthiness. The FDIC has no obligation to provide seller financing even if the person is not in any way disqualified from purchasing assets from the FDIC under the restrictions set forth in the proposed rule. Further, under paragraph (e) of the proposed rule, the FDIC expressly reserves its authority to promulgate other policies and rules restricting purchaser eligibility to buy assets from the FDIC.

Paragraph (f) sets forth the requirement that a prospective purchaser certify, before purchasing any asset from the FDIC and under penalty of perjury, that none of the restrictions in the proposed rule applies to the sale. This requirement creates an effective mechanism to comply with Section 210(r) and the proposed rule. The FDIC will provide the form for the certification and the proposed rule contemplates that the form may change over time. Certain types of entities are exempt from this self-certification requirement, unless the Director of the FDIC's Division of Resolutions and Receiverships (or designee) determines that a certification is required. These exempted entities are: (1) State or political subdivisions of a State; (2) Federal agencies or instrumentalities such as the Government National Mortgage Association; (3) federally-regulated, government-sponsored enterprises such as the Federal National Mortgage Association or the Federal Home Loan Mortgage Corporation; and (4) bridge financial companies established by the FDIC. Because of the nature of these entities, including their organizational purposes or goals and the fact that they are subject to strict governmental control or oversight, it is reasonable to presume compliance without requiring self-certification.

III. Request for Comments

The FDIC requests comments on any aspect of the proposed rule that would be helpful in refining the proposed rule further. In addition, the FDIC specifically requests comments on the following issues:

- Whether it is appropriate to prohibit individuals or entities who profited or engaged in wrongdoing at the expense of a covered financial company or seriously mismanaged a covered financial company from buying assets of *any* covered financial company from the FDIC, rather than prohibiting the individual or entity from buying an asset of only the specific covered financial company that the individual or entity had been involved with.
- Whether it is appropriate to prohibit individuals or entities that profited or engaged in wrongdoing at the expense of an insured depository institution or seriously mismanaged an insured depository institution from buying assets of a covered financial company from the FDIC.
- Whether the description in paragraph (a)(3) of the transactions that are not prohibited under Section 210(r) or the proposed rule adequately describes the range of transactions in which the customary manner for sale and settlement does not permit the seller to know the identity of the purchaser or to exercise any control in selecting the purchaser.
- Whether the definition of “associated person” should be expanded or clarified.

- Whether the dollar threshold in the definition of “substantial loss” is appropriate.
- Whether the scope of entities that would be exempt from the self-certification process described in paragraph (f) should be supplemented with other types of entities that might purchase assets from the FDIC, or whether any of the entities excepted under paragraph (f) should in fact be required to certify compliance.

All comments must be received by the FDIC not later than **[INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

IV. Regulatory Analysis and Procedure

A. Paperwork Reduction Act

1. Request for Comment on Proposed Information Collection

In accordance with the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501, *et seq.*) (the “PRA”), the FDIC may not conduct or sponsor, and the respondent is not required to respond to, an information collection unless it displays a currently valid Office of Management and Budget (“OMB”) control number. As indicated by § 380.13(f) of the proposed rule, the FDIC intends to develop a purchaser eligibility certification form relating to this proposed rule. The form would be used to establish compliance with the proposed rule by a prospective purchaser of assets of a covered financial company from the FDIC. The FDIC believes that the

certification is a collection of information under the PRA and, consistent with the requirements of 5 CFR 1320.11, the FDIC has submitted the form to OMB for review under section 3507(d) of the PRA.

Comments are invited on:

- Whether the collection of information is necessary for the proper performance of the agencies' functions, including whether the information has practical utility;
- The accuracy of the estimates of the burden of the information collection, including the validity of the methodology and assumptions used;
- Ways to enhance the quality, utility, and clarity of the information to be collected;
- Ways to minimize the burden of the information collection on respondents, including through the use of automated collection techniques or other forms of information technology; and
- Estimates of capital or start-up costs and costs of operation, maintenance, and purchase of services to provide information.

All comments will become a matter of public record. Commenters may submit comments on the proposed information collection and burden estimates at the addresses listed under the

“ADDRESSES” heading above. A copy of the comments may also be submitted to the attention of the OMB desk officer for the FDIC: by mail to U.S. Office of Management and Budget, 725 17th Street, NW, #10235, Washington, DC 20503; by facsimile to 202-395-6974; or by email to: oir_submission@omb.eop.gov.

2. Proposed Information Collection

Title of Information Collection: Covered Financial Company Purchaser Eligibility Certification.

Affected Public: Prospective purchasers of covered financial company assets.

Frequency of Response: Event generated.

Estimated Number of Respondents: 20.

Time per Response: 30 minutes.

Total Estimated Annual Burden: 10 hours.

B. Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 et seq.) requires an agency that is issuing a proposed rule to prepare and make available an initial regulatory flexibility analysis of a proposed regulation. The Regulatory Flexibility Act provides, however, that an agency is not required to prepare and publish a regulatory flexibility analysis if the agency certifies that the proposed rule will not have a significant economic impact on a substantial number of small entities. The FDIC hereby certifies pursuant to 5 U.S.C. 605(b) that the proposed rule would not

have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

Under regulations issued by the Small Business Administration (13 CFR 121.201), a “small entity” includes those firms in the “Finance and Insurance” sector whose size varies from \$7 million or less in assets to \$175 million or less in assets. The proposed rule is promulgated under the Title II of the Dodd-Frank Act, which establishes a regime for the orderly liquidation of the nation’s largest, and most systemic companies. For instance, companies subject to enhanced supervision under the Dodd-Frank Act include bank holding companies with assets in excess of \$50,000,000.00. The orderly liquidation of assets of such a large, systemic company generally will involve the sale of significant subsidiaries and business lines rather than smaller asset sales, and such sales are unlikely to impact a substantial number of small entities.

Moreover, the burden imposed by this proposed rule is the completion of a certification form described above in the Paperwork Reduction Act section. Completing the certification form does not require the use of professional skills or the preparation of special reports or records and has a minimal economic impact on those individuals and entities that seek to purchase assets from the FDIC. Thus, any impact on small entities will not be substantial.

C. Plain Language

Section 722 of the Gramm-Leach-Bliley Act of 1999 (Pub. L. 106–102, 113 Stat. 1338, 1471) requires the Federal banking agencies to use plain language in all proposed and final rules

published after January 1, 2000. The FDIC has sought to present the proposed rule in a simple and straightforward manner. The FDIC invites comments on whether the proposed rule is clearly stated and effectively organized, and how the FDIC might make the proposed rule text easier to understand.

List of Subjects in 12 CFR Part 380

Asset disposition, Bank holding companies, Covered financial companies, Financial companies, Holding companies, Insurance companies, Nonbank financial companies.

For the reasons set forth in the preamble, the Federal Deposit Insurance Corporation proposes to amend 12 CFR 380 as follows:

PART 380 —ORDERLY LIQUIDATION AUTHORITY

1. Revise the authority for part 380 to read as follows:

Authority: 12 U.S.C. 5389; 12 U.S.C. 5390(s)(3); 12 U.S.C. 5390(b)(1)(C); 12 U.S.C. 5390(a)(7)(D); 12 U.S.C. 5381(b); 12 U.S.C. 5390(r).

2. Add § 380.13 to read as follows:

§ 380.13 Restrictions on sale of assets of a covered financial company by the Federal Deposit Insurance Corporation.

(a) *Purpose and applicability*—(1) *Purpose*. The purpose of this section is to prohibit individuals or entities that profited or engaged in wrongdoing at the expense of a covered financial company or an insured depository institution, or seriously mismanaged a covered financial company or an insured depository institution, from buying assets of a covered financial company from the FDIC.

(2) *Applicability*. (i) The restrictions of this section apply to the sale of assets of a covered financial company by the FDIC as receiver or in its corporate capacity.

(ii) The restrictions in this section apply to the sale of assets of a bridge financial company if:

(A) The sale is not in the ordinary course of business of the bridge financial company, and

(B) The approval or non-objection of the FDIC is required in connection with the sale according to the charter, articles of association, bylaws or other documents or instruments establishing the governance of the bridge financial company and the authorities of its board of directors and executive officers.

(iii) In the case of a sale of securities backed by a pool of assets that may include assets of a covered financial company by a trust or other entity, this section applies only to the sale of assets by the FDIC to an underwriter in an initial offering, and not to any other purchaser of the securities.

(iv) The restrictions of this section do not apply to a sale of a security or a group or index of securities, a commodity, or any qualified financial contract that customarily is traded through a financial intermediary, as defined in paragraph (b) of this section, where the seller cannot control selection of the purchaser and the sale is consummated through that customary practice.

(v) The restrictions of this section do not apply to a judicial sale or a trustee's sale of property that secures an obligation to the FDIC where the sale is not conducted or controlled by the FDIC.

(vi) The restrictions of this section do not apply to the sale or transfer of an asset if such sale or transfer resolves or settles, or is part of the resolution or settlement of, one (1) or more claims or obligations that have been, or could have been, asserted by the FDIC against the person with whom the FDIC is settling regardless of the amount of such claims or obligations.

(3) The FDIC retains the authority to establish other policies restricting asset sales. Neither 12 U.S.C. 5390(r) nor § 380.13 in any way limits the authority of the FDIC to establish policies prohibiting the sale of assets to prospective purchasers who have injured the respective covered financial company, or to other prospective purchasers, such as certain employees or contractors of the FDIC, or individuals who are not in compliance with the terms of any debt or duty owed to the FDIC in any of its capacities. Any such policies may be independent of, in conjunction with, or in addition to the restrictions set forth in this part.

(b) *Definitions.* Many of the terms used in this section are defined in the Dodd-Frank Wall Street Reform and Consumer Protection Act, 12 U.S.C. 5301, et seq. Additionally, for the purposes of this section, the following terms are defined:

Associated person. An “associated person” of an individual or entity means:

(i) With respect to an individual:

(A) The individual’s spouse or dependent child or any member of his or her immediate household;

(B) A partnership of which the individual is or was a general or limited partner or a limited liability company of which the individual is or was a member; or

(C) A corporation of which the individual is or was an officer or director;

(ii) With respect to a partnership, a managing or general partner of the partnership or with respect to a limited liability company, a manager; or

(iii) With respect to any entity, an individual or entity who, acting individually or in concert with one or more individuals or entities, owns or controls 25 percent or more of the entity.

Default. The term “default” means any failure to comply with the terms of an obligation to such an extent that:

(i) A judgment has been rendered in favor of the FDIC or a covered financial company; or

(ii) In the case of a secured obligation, the lien on property securing such obligation has been foreclosed.

Financial intermediary. The term “financial intermediary” means any broker, dealer, bank, underwriter, exchange, clearing agency registered with the SEC under section 17A of the Securities Exchange Act of 1934, transfer agent (as defined in section 3(a)(25) of the Securities Exchange Act of 1934), central counterparty or any other entity whose role is to facilitate a transaction by, as a riskless intermediary, purchasing a security or qualified financial contract from one counterparty and then selling it to another.

Obligation. The term “obligation” means any debt or duty to pay money owed to the FDIC or a covered financial company, including any guarantee of any such debt or duty.

Person. The term “person” means an individual, or an entity with a legally independent existence, including: a trustee; the beneficiary of at least a 25 percent share of the proceeds of a trust; a partnership; a limited liability company, a corporation; an association; or other organization or society.

Substantial loss. The term “substantial loss” means:

- (i) An obligation that is delinquent for ninety (90) or more days and on which there remains an outstanding balance of more than \$50,000;
- (ii) An unpaid final judgment in excess of \$50,000 regardless of whether it becomes forgiven in whole or in part in a bankruptcy proceeding;
- (iii) A deficiency balance following a foreclosure of collateral in excess of \$50,000, regardless of whether it becomes forgiven in whole or in part in a bankruptcy proceeding; or
- (iv) Any loss in excess of \$50,000 evidenced by an IRS Form 1099–C (Information Reporting for Cancellation of Debt).

(c) *Restrictions on the sale of assets.* (1) A person may not acquire any assets of a covered financial company from the FDIC if, prior to the appointment of the FDIC as receiver for the covered financial company, the person or its associated person:

(i) Has participated as an officer or director of a covered financial company or of an affiliate of a covered financial company in a material way in one or more transactions that caused a substantial loss to a covered financial company;

(ii) Has been removed from, or prohibited from participating in the affairs of, a financial company pursuant to any final enforcement action by its primary financial regulatory agency;

(iii) Has demonstrated a pattern or practice of defalcation regarding obligations to a covered financial company;

(iv) Has been convicted of committing or conspiring to commit any offense under 18 U.S.C. 215, 656, 657, 1005, 1006, 1007, 1008, 1014, 1032, 1341, 1343 or 1344 affecting any covered financial company and there has been a default with respect to one or more obligations owed by that person or its associated person; or

(v) Would be prohibited from purchasing the assets of a failed insured depository institution from the FDIC under 12 U.S.C. 1821(p) or its implementing regulation at 12 CFR part 340.

(2) For purposes of paragraph (c)(1) of this section, a person has participated in a “material way in a transaction that caused a substantial loss to a covered financial company” if, in connection with a substantial loss to the covered financial company, the person has been found in a final determination by a court or administrative tribunal, or is alleged in a judicial or administrative action brought by a primary financial regulatory agency or by any component of the government of the United States or of any state:

(i) To have violated any law, regulation, or order issued by a Federal or State regulatory agency, or breached or defaulted on a written agreement with a Federal or State regulatory agency, or breached a written agreement with a covered financial company; or

(ii) To have breached a fiduciary duty owed to a covered financial company.

(3) For purposes of paragraph (c)(1) of this section, a person or its associated person has demonstrated a “pattern or practice of defalcation” regarding obligations to a covered financial company if the person or associated person has:

(i) Engaged in more than one transaction that created an obligation on the part of such person or its associated person with intent to cause a loss to any financial company or with reckless disregard for whether such transactions would cause a loss to any such financial company; and

(ii) The transactions, in the aggregate, caused a substantial loss to one or more covered financial companies.

(d) *Restrictions when FDIC provides seller financing.* A person may not borrow money or accept credit from the FDIC in connection with the purchase of any assets from the FDIC or any covered financial company if:

(1) There has been a default with respect to one or more obligations totaling in excess of \$1,000,000 owed by that person or its associated person; and

(2) The person or its associated person made any fraudulent misrepresentations in connection with any such obligation(s).

(e) *No obligation to provide seller financing.* The FDIC still has the right to make an independent determination, based upon all relevant facts of a person's financial condition and history, of that person's eligibility to receive any loan or extension of credit from the FDIC, even if the person is not in any way disqualified from purchasing assets from the FDIC under the restrictions set forth in this section.

(f) *Purchaser eligibility certificate required.* (1) Before any person may purchase any asset from the FDIC that person must certify, under penalty of perjury, that none of the restrictions

contained in this section applies to the purchase. The FDIC may establish the form of the certification and may change the form from time to time.

(2) Notwithstanding paragraph (f)(1) of this section, and unless the Director of the FDIC's Division of Resolutions and Receiverships, or designee, in his or her discretion so requires, a certification need not be provided by:

(i) A State or political subdivision of a State;

(ii) A Federal agency or instrumentality such as the Government National Mortgage Association;

(iii) A federally-regulated, government-sponsored enterprise such as Federal National Mortgage Association or Federal Home Loan Mortgage Corporation; or

(iv) A bridge financial company.

Dated at Washington, D.C. this 30th day of October, 2013.

By Order of the Board of Directors, Federal Deposit Insurance Corporation.

Valerie J. Best
Assistant Executive Secretary.

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